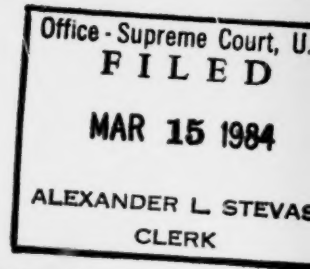


83 - 1534

①

**Case No.**



IN THE

**Supreme Court of the United States**

---

OCTOBER TERM, 1983

---

FRANK GRAY, et. al.,  
*Petitioners,*

v.

DARIES SHERRILLS,  
*Respondent.*

---

**ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

---

---

**PETITION FOR WRIT OF CERTIORARI**

---

ANTHONY J. CELEBREZZE, JR.  
Attorney General of Ohio

ALLEN P. ADLER  
Counsel of Record

Assistant Attorney General  
State Office Tower, 26th Floor  
30 East Broad Street  
Columbus, Ohio 43215

**ATTORNEYS FOR PETITIONERS**



## **QUESTION PRESENTED**

**DOES A DISTRICT COURT HAVE THE DISCRETION  
AND AUTHORITY TO *SUA SPONTE* DISMISS A  
FRIVOLOUS, MALICIOUS, AND GROUNDLESS  
CLAIM?**

## **PARTIES**

The petitioners in this matter are Frank Gray, the former superintendent of the Ohio State Reformatory, Dr. Marvin Green, a physician formerly employed by the Columbus Correctional Facility (CCF), Lou Ann Smith, a nursing supervisor employed at CCF, and Ruby Cummings, a practical nurse formerly employed by CCF. The respondent is Daries Sherrills, a prisoner of the State of Ohio.

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED .....	i
PARTIES .....	ii
DECISIONS BELOW .....	1
JURISDICTION .....	1
STATUTORY PROVISION INVOLVED .....	2
STATEMENT OF THE CASE .....	7
ARGUMENT IN SUPPORT OF GRANTING CERTIORARI .....	9
CONCLUSION .....	13
CERTIFICATE OF SERVICE .....	14

## TABLE OF AUTHORITIES

	<b>PAGE</b>
<b>Cases</b>	
<i>Amfac Mortgage Corp. v. Arizona Mall of Tempe, Inc.,</i> 583 F.2d 426 (9th Cir. 1978) . . . . .	11
<i>Bell v. Hood,</i> 327 U.S. 678 (1946) . . . . .	9
<i>Bennett v. Passic,</i> 545 F.2d 1260 (10th Cir. 1976) . . . . .	11
<i>Board of Regents v. Tomanio,</i> 446 U.S. 478 (1980) . . . . .	10
<i>Boyce v. Alizaduh,</i> 595 F.2d 948 (4th Cir. 1979) . . . . .	11
<i>Brown v. Schneckloth,</i> 421 F.2d 1402 (9th Cir. 1970) . . . . .	11
<i>Clark v. Paul Gray, Inc.,</i> 306 U.S. 583 (1939) . . . . .	9
<i>Conley v. Gibson,</i> 355 U.S. 41 (1957) . . . . .	10
<i>Estelle v. Gamble,</i> 429 U.S. 97 (1976) . . . . .	7, 9, 10
<i>Forester v. California Adult Authority,</i> 510 F.2d 58 (8th Cir. 1975) . . . . .	11
<i>Haines v. Kerner,</i> 404 U.S. 519 (1972) . . . . .	10
<i>Kane v. Ford Motor Co.,</i> 450 F.2d 315 (3rd Cir. 1971) . . . . .	11
<i>Louisiana &amp; N.R. Co. v. Mottley,</i> 211 U.S. 149 (1908) . . . . .	9
<i>Malone v. Colyer,</i> 710 F.2d 258 (6th Cir. 1983) . . . . .	10, 11, 12

<i>Martin v. U.S.,</i> 273 F.2d 775 (D.C. Cir. 1960) .....	11
<i>McNutt v. General Motors Acceptance,</i> <i>Corp.,</i> 298 U.S. 178 (1936) .....	9
<i>Metcalf v. City of Watertown,</i> 128 U.S. 586 (1888) .....	9
<i>Ogletree v. McNamara,</i> 449 F.2d 93 (6th Cir. 1971) .....	10
<i>Oswalt v. Scripto, Inc.,</i> 616 F.2d 191 (5th Cir. 1980) .....	11
<i>Park Hills Music Club v. Board of</i> <i>Education, Etc.,</i> 512 F.Supp. 1040 (S.D. Ohio 1981) .....	9
<i>Potomac Passengers Ass'n. v. Chesapeake</i> <i>&amp; Ohio Ry. Co.,</i> 520 F.2d 91 (D.C. Cir. 1975) .....	11
<i>Preiser v. Rodriguez,</i> 411 U.S. 475 (1973) .....	10
<i>Sinwell v. Shapp,</i> 536 F.2d 15 (3rd Cir. 1976) .....	11
<i>Smart v. Villar,</i> 547 F.2d 112 (10th Cir. 1976) .....	11
<i>Stewart v. Rhodes,</i> 656 F.2d 1216 (6th Cir. 1981) .....	10
<i>Taylor v. Gibson,</i> 529 F.2d 709 (5th Cir. 1976) .....	11
<i>Tingler v. Marshall,</i> 716 F. 2d 1109 (6th Cir. 1983) .....	7, 11, 12

## OTHER AUTHORITIES

### PAGE

#### Statutes and Rules

Title 28, United States Code, Section 1915 . . . . .	7, 10, 11, 12
Title 42, United States Code, Section 1983 . . . . .	7
Rule 12, Federal Rules of Civil Procedure . . . . .	9, 12
Section 2305.11, Ohio Revised Code . . . . .	10

#### Publications

<i>Recommended Procedures for Handling Prisoner Civil Rights Cases in Federal Courts</i> (1980) . . . . .	12
Sensenich, I., <i>Compendium of the Law on Prisoners' Rights</i> (1979) . . . . .	12

#### Miscellaneous

Wright and Miller, <i>Federal Practice and Procedure</i> , §1350 (1969). . . . .	11
--	----



**DECISIONS BELOW**

The decision of the United States Court of Appeals for the Sixth Circuit is unreported. (A-3). The decision of the United States District Court for the Southern District of Ohio, Eastern Division is unreported. (A-7).

**JURISDICTION**

The judgment of the United States Court of Appeals for the Sixth Circuit was entered December 20, 1983. Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

This case involves Amendment VIII to the Constitution of the United States which prohibits cruel and unusual punishment:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment VIII is made applicable to the states by Sections 1 and 5 of Amendment XIV to the Constitution of the United States:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XIV is enforced by Title 42, Section 1983, United States Code:

Every person who, under color of any stat-

ute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This case also involves the application of Title 28, Section 1915(d), United States Code:

**Proceedings in forma pauperis**

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the alle-

gation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

and Rules 12(b)(1), 12(b)(6) and 12(h)(3) of the Federal Rules of Civil Procedure:

**(b) How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter,

. . .

(6) failure to state a claim upon which relief can be granted,

. . .

(h)(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

This case also involves the relevance of pertinent parts of Ohio Revised Code Section 2305.11:

**[Time limitations for bringing certain actions; definitions.]**

(A) An action for libel, slander, assault, battery, malicious prosecution, false impri-

sonment, or malpractice, including an action for malpractice against a physician, podiatrist, or a hospital, or upon a statute for a penalty or forfeiture, shall be brought within one year after the cause thereof accrued, provided that an action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the non-payment of minimum wages or overtime compensation, shall be brought within two years after the cause thereof accrued.

If a written notice, prior to the expiration of time contained in this division, is given to any person in a medical claim that an individual is presently considering bringing an action against that person relating to professional services provided to that individual, then an action by that individual against that person may be commenced at any time within one hundred eighty days after that notice is given.

(B) In no event shall any medical claim against a physician, podiatrist, or a hospital be brought more than four years after the act or omission constituting the alleged malpractice occurred. The limitations in this section for filing such a malpractice action against a physician, podiatrist, or hospital apply to all persons regardless of legal disability and notwithstanding section 2305.16 of the Revised Code, provided that a minor who has not attained his tenth birthday shall have until his fourteenth birthday in which to file an action for malpractice against a physician or hospital. ...

CASE NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

FRANK GRAY, et. al.,  
*Petitioners,*

v.

DARIES SHERRILLS,  
*Respondent.*

---

ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

---

PETITION FOR WRIT OF CERTIORARI

---

Petitioners Frank Gray, Marvin Green, Lou Ann Smith and Ruby Cummings respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 20, 1983.

## STATEMENT OF THE CASE

This case originated with the filing of a form complaint in the United States District Court for the Southern District of Ohio, Eastern Division on June 21, 1983. (A-9). The case was assigned number C-2-83-1104. The respondent, a prisoner, alleged that on one unspecified occasion during a four year period, beginning January 1, 1976 and ending December 31, 1979, one of the petitioners, Ruby Cummings, negligently gave him another prisoner's medication. No claim was made against the other petitioners. The only relief requested was the respondent's release from prison and the closing of the Columbus Correctional Facility. The complaint was filed under 42 U.S.C. §1983 and alleged a violation of the Eighth Amendment. The respondent was granted pauper status under 28 U.S.C. §1915.

The case was dismissed *sua sponte* the same day it was filed pursuant to the decision in *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The respondent had failed to allege a proper 42 U.S.C. §1983 claim. He alleged negligence; he did not allege deliberate indifference to a serious medical need. (A-14).

A notice of appeal was filed on July 11, 1983. (A-5). The United States Court of Appeals for the Sixth Circuit treated the appeal as two separate cases and assigned two case numbers, 83-3469 and 83-3499. The appeals were later consolidated. On December 20, 1983, the appellate court ordered the judgment of the district court vacated and remanded the case for further proceedings. (A-3). The appeal was decided on a single pleading, the respondent's request for appointment of counsel. No briefs were filed; no argument was held.

The reversal was based on the decision in *Tingler v. Marshall*, 716 F.2d 1109 (6th Cir. 1983), which was construed to hold that no civil rights complaint can be dismissed before the district court follows a set procedure. (A-4). The court must: serve the complaint on the defendant; notify all parties

of its intent to dismiss; state in the notification the reasons for the contemplated dismissal; permit the plaintiff to amend the complaint or otherwise reply to the court's stated reasons for dismissal; allow the defendants to file an answer or other response; and, if the claim is finally dismissed, file a second order restating the reasons for the dismissal. (A-4).



## ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

### A. Conflict With Decisions Of This Court

Not only does the appellate court's order in this matter create, in the cause of judicial economy, a needlessly complicated procedure and place the district courts in the position of acting as legal advisors to plaintiffs, the order also strips the district courts of their discretion to make jurisdictional decisions. This Court has repeatedly held that lack of subject matter jurisdiction may be asserted, *sua sponte*, at any time by a trial or appellate court. *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936); *Louisiana & N.R. Co. v. Mottley*, 211 U.S. 149 (1908); *Metcalf v. City of Watertown*, 128 U.S. 586 (1888). Rule 12(h)(3) of the Federal Rules of Civil procedure provides for the *sua sponte* dismissal of actions on jurisdictional grounds.

This case not only involves a failure to state a proper claim for relief, it clearly involves a claim that fails to raise a substantial federal question. Because the respondent has failed to raise a substantial federal question, he has failed to invoke the jurisdiction of the district court. The district court, in the absence of a jurisdictional foundation, correctly dismissed the action. *Bell v. Hood*, 327 U.S. 678, 682-683 (1946); see also *Park Hills Music Club v. Board of Education, Etc.*, 512 F.Supp. 1040 1043-1044 n.2 (S.D. Ohio 1981). The absence of jurisdiction based on a substantial federal question is evident on the face of the complaint. The respondent clearly alleged that he was given the wrong medication "(d)ue to negligence". (A-14). A claim of negligent medical treatment or malpractice cannot create a claim under the Eighth Amendment, *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), and cannot present a substantial federal question, *Id.*, at 106-107.

The appellate court's decision also fails to consider the authority of the district courts to *sua sponte* dismiss claims

under 28 U.S.C. §1915(d). The order states that no civil rights complaint can be dismissed until the trial court follows the prescribed procedures. (A-4). Clearly, a district court can dismiss a frivolous or malicious complaint after granting *in forma pauperis* status without service of process or educating the plaintiff. An action is frivolous if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Haines v. Kerner*, 404 U.S. 519, 520-521 (1972); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); see also *Malone v. Colyer*, 710 F.2d 258, 260-261 (6th Cir. 1983). A claimed violation of the Eighth Amendment based on negligence is clearly frivolous, *Estelle, supra*, at 106, and subject to *sua sponte* dismissal under 28 U.S.C. §1915(d).

The frivolous and groundless nature of the respondent's complaint is also evident for several other reasons. The district court could have dismissed three of the petitioners, Gray, Green and Smith, because no claim was stated against them. The action could have been dismissed because it was outside the most closely analogous state statute of limitations, Ohio Revised Code §2305.11. *Board of Regents v. Tomanio*, 446 U.S. 478 (1980). The complaint could have been dismissed because of its lack of specificity as to the time of the alleged deprivation. See *Ogletree v. McNamara*, 449 F.2d 93, 98-99 (6th Cir. 1971). The complaint could also have been dismissed because the court lacked the authority to grant the requested relief. The respondent's request that the prison be closed was moot, see *Stewart v. Rhodes*, 656 F.2d 1216, 1217 (6th Cir. 1981), and the court was powerless to grant him a release from custody, *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

## **B. Conflict With Other Circuits**

Other federal appellate courts have consistently upheld the right of trial courts to *sua sponte* dismiss cases over which

they lacked jurisdiction. *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 192 (5th Cir. 1980); *Amfac Mortgage Corp. v. Arizona Mall of Tempe, Inc.*, 583 F.2d 426, 430 n.5 (9th Cir. 1978); *Potomac Passengers Ass'n. v. Chesapeake & Ohio Ry. Co.*, 520 F.2d 91, 95 n.22 (D.C. Cir. 1975); *Kane v. Ford Motor Co.*, 450 F.2d 315, 317 n.1 (3rd Cir. 1971); Wright and Miller, *Federal Practice and Procedure*, §1350, at 545 (1969) (Cum. Supp. 1982).

District court dismissals under 28 U.S.C. §1915(d) have also been repeatedly upheld. *Boyce v. Alizaduh*, 595 F.2d 948, 950 (4th Cir. 1979); *Smart v. Villar*, 547 F.2d 112 (10th Cir. 1976); *Bennett v. Passic*, 545 F.2d 1260, 1261-1262 (10th Cir. 1976); *Sinwell v. Shapp*, 536 F.2d 15, 18 (3rd Cir. 1976); *Taylor v. Gibson*, 529 F.2d 709, 714 n.6 (5th Cir. 1976); *Forester v. California Adult Authority*, 510 F.2d 58, 60 (8th Cir. 1975); *Brown v. Schneckloth*, 421 F.2d 1402, 1403 (9th Cir. 1970); *Martin v. U.S.*, 273 F.2d 775, 778 (D.C. Cir. 1960). The United States Court of Appeals for the Sixth Circuit has recognized the viability of such dismissals, *Tingler*, *supra* at 1111, and established the standard of frivolity to be used under 42 U.S.C. §1915(d), *Malone*, *supra* at 261.

### C. Importance Of The Issue

The appellate court's decision in the instant case must be reviewed. The decision complicates an efficient method of checking the ever increasing flood of groundless, frivolous and malicious civil rights litigation spewing out of this nation's prisons. This decision effectively stops the district courts from dismissing a civil rights complaint without first notifying the plaintiff that his complaint is groundless or frivolous and explaining the reasons why it should be dismissed. The plaintiff is then afforded an opportunity to further modify, restate and add to his vexatious claim in order to achieve some semblance of a proper complaint. The practice will certainly lead to increases in the federal courts'

workload, the expenses of litigating frivolous claims, and the aggravation of harassed defendants. The increase in time and money spent litigating groundless claims is not likely to result in a corresponding increase in the clarity and limits of the law governing the treatment of prisoners.

A reversal of the appellate court's decision will also serve to clarify the authority of the federal courts to dismiss cases under 28 U.S.C. §1915(d) and Rule 12(h)(3) as well as under Rule 12(b)(1) and Rule 12(b)(6). The difference between a jurisdictional issue based on a federal question and failure to state a proper claim can be better defined. This decision clashes with recommendations made by the Federal Judicial Center. The Federal Judicial Center, in at least two publications, has recommended that groundless claims be dismissed *sua sponte*. See *Recommended Procedures for Handling Prisoner Civil Rights Cases in Federal Courts* (1980), pp. 59-63; I. Sensenich, *Compendium of the Law on Prisoners' Rights* (1979), pp. 51-65.

The confusion that presently exists over the proper method for disposing of the frivolous and groundless complaints of prisoners is nowhere more evident than in the Sixth Circuit. The decision in the instant case, made without regard to Rule 12(h)(3) or 28 U.S.C. §1915(d), is that a civil rights case can never be dismissed *sua sponte*. The decision in *Tingler, supra*, permits the *sua sponte* dismissal of cases under 28 U.S.C. §1915(d) if the standard of "frivolous" set out in *Malone, supra*, is established. The decision in *Tingler, supra* does not address Rule 12(h)(3). The definition of "frivolous" in *Malone, supra*, is identical to that of Rule 12(b)(6).

**CONCLUSION**

For these reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

**ANTHONY J. CELEBREZZE, Jr.**  
Attorney General

---

**ALLEN P. ADLER**  
**COUNSEL OF RECORD**  
Assistant Attorney General  
State Office Tower, 26th Floor  
30 East Broad Street  
Columbus, Ohio 43215  
(614) 466-5414

**ATTORNEYS FOR PETITIONERS**

**CERTIFICATE OF SERVICE**

I hereby certify that the requisite number of copies of the foregoing Petition for Writ of Certiorari have been served upon respondent by forwarding such copies to Daries Sherrills, #172-312, Ohio State Reformatory, P.O. Box 788, Mansfield, Ohio 44901, by United States mail, postpaid, this \_\_\_\_\_ day of March, 1984. I further certify that all parties required to be served have been served.

---

**ALLEN P. ADLER**  
Assistant Attorney General

Case No. \_\_\_\_\_

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

FRANK GRAY, et. al.,  
*Petitioners,*

vs.

DARIES SHERRILLS,  
*Respondent.*

---

**ON PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

---

**APPENDIX**

---



## INDEX

	Page
Order of December 20, 1983, USCA 6th Cir. ....	A-3
Notice of Appeal filed July 11, 1983.....	A-5
Judgment of June 21, 1983, USDC/SD Ohio.....	A-6
Order of June 21, 1983 USDC/SD Ohio.....	A-7
Complaint filed June 21, 1983 .....	A-9



A-3

No. 83-3469

No. 83-3499

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

DARIES SHERRILLS,  
Plaintiff-Appellant,

v.

FRANK GRAY; MRS. SMITH;  
RUBY CUMMINGS; AND DR. GREENE,  
Defendants-Appellees.

**ORDER**

Filed December 20, 1983

**NOT RECOMMENDED FOR  
FULL-TEXT PUBLICATION**

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

*This notice is to be prominently displayed if this decision is reproduced.*

BEFORE: EDWARDS and KRUPANSKY, Circuit Judges;  
and PECK, Senior Circuit Judge.

The plaintiff requests the appointment of counsel to represent him in his appeal from the dismissal of his civil rights complaint. The district court *sua sponte* dismissed the complaint on the merits. This appeal has been referred to a panel

of the Court pursuant to Rule 9(a), Rules of the Sixth Circuit. After an examination of plaintiff's brief and the record, this panel agrees unanimously that oral argument is not necessary. Rule 34(a), Federal Rules of Appellate Procedure.

Another panel of this Court recently decided the case of *Tingler v. Marshall*, 716 F.2d 1109 (6th Cir., 1983). *Tingler* holds that before a district court can *sua sponte* dismiss a civil rights complaint, the court must: (1) allow service of the complaint upon the defendant; (2) notify all parties of its intent to dismiss the complaint; (3) give the plaintiff a chance to either amend his complaint or respond to the reasons stated by the district court in its notice of intended *sua sponte* dismissal; (4) give the defendant a chance to respond or file an answer or motions; and (5) if the claim is dismissed, state its reasons for the dismissal. *Id.*

In the present case, the district court did not take any of the above actions when it dismissed the complaint. Therefore, the case must be remanded for further proceedings.

Accordingly, the motion for appointment of counsel is denied. The judgment of the district court is vacated and the cause remanded for further proceedings in light of *Tingler*. Rule 9(d)(4), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman  
Clerk

A-5

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

Daries Sherrills  
Plaintiff

vs.

Case Number C-2-83-1104

Frank Gray, Supt. et.al.

**CIVIL ACTION**  
**NOTICE OF APPEAL**

Filed July 11, 1983

Now comes, Daries Sherrills, plaintiff in the above styled cause and hereby gives notice of appeal of the judgement and order rendered and imposed therein on the 21 day of June, 1983 in the United States District Court Southern District of Ohio; Columbus, Ohio 43215

Respectfully submitted

/s/ "Pro Se" Daries Sherrills

I, Daries Sherrills, certify that I have caused a true copy of this motion to be sent by U.S. Mail to the Clerk of Courts United States District Court Columbus, Ohio 43215; this 5 day of July 1983.

A-6

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO

Daries Sherrills

v.

Frank Gray, Supt. et. al.

Case Number C-2-83-1104

Judge Robert M. Duncan

**JUDGMENT IN A CIVIL CASE**

Filed June 21, 1983

**Decision by Court.** This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED the Court holds that the complaint is without merit; and, therefore, it is denied. This action is hereby dismissed. Judgment is entered for the defendants.

KENNETH J. MURPHY, CLERK

BY: /s/ Thomas F. O'Reilly

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

DARIES SHERRILLS

Plaintiff

v.

Case Number C-2-83-1104

FRANK GRAY, Supt., et. al.

Defendants

**CIVIL ACTION  
ORDER**

Filed June 21, 1983

Plaintiff Daries Sherrills, a prisoner at the Ohio State Reformatory, brings this action under 42 U.S.C. §1983 alleging that he was denied proper medical treatment. This matter is before the Court on the complaint.

The complaint alleges that during 1976 to 1979 while he was receiving medical attention at the Columbus Correctional Facility, Nurse Ruby Cummings gave him someone else's heart medication instead of Darvocet which was prescribed by Dr. Greene.

Prison officials may not act with "deliberate indifference to [a prisoner's] serious medical needs. ..." *Estelle v. Gambel*, 429 U.S. 97, 104 (1976). However, the Eighth Amendment does not prohibit medical malpractice. 429 U.S. at 106; *Wester v. Jones*, 554 F.2d 1285, 1286 (4th Cir. 1977); *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077, 1081 (3d Cir. 1976). To establish an Eighth Amendment claim, the prisoner must prove (1) deliberate indifference (2) to his serious medical needs. *West v. Keve*, 571 F.2d 158, 161 (3d Cir. 1978).

Here the complaint alleges, at most, medical malpractice in the negligent dispensing of medication. That does not

state a claim for relief under the Eighth Amendment.

Accordingly, the Court HOLDS that the complaint is without merit; and, therefore, it is DENIED.

This action is hereby DISMISSED. The Clerk of Court shall enter JUDGMENT for defendants. Copies of the complaint and this Order shall be mailed to the Attorney General of Ohio, State Office Tower, 26th Floor, 30 East Broad Street, Columbus, Ohio 43215 and to each defendant named in the complaint.

/s/ Robert M. Duncan  
United States  
District Judge

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

Daries Sherrills #172-312

v.

Case Number C-2-83-1104

Doctor Greene

Nursing Director Mr. Smith

Frank Gray Superintendent O.S.R.

Ruby Cummings Nurse

**COMPLAINT**

Filed June 21, 1983

**I. Previous Lawsuits.**

- A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment?  
Yes (X) No ( )
- B. If your answer to A is yes, describe the lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.
  1. Parties to this previous lawsuit  
Plaintiffs: Daries Sherrills #172-312  
Defendants: State of Ohio et al
  2. Court (if Federal Court, name the District; if State Court, name the County): Northern District Eastern Division
  3. Docket Number: C83-147
  4. Name of Judge to whom case was assigned:  
Mrs. Ann Aldrich
  5. Disposition (for example, Was the case dismissed? Was it appealed? Is it still pending?  
Still pending

I. Previous Lawsuits

(1) Daries Sherrills #172-312

Plaintiff

Governor Richard F. Celeste et al.

Atty. General Anothly Celebrezze. T.D. Taylor

C.C.F. Mr. Seither

Defendants

Southern District of Ohio Eastern Division

Case No. Unknown

Judge Unknown

Still Pending

Filed around May 1983

Ending date—Unknown

I. Previous Lawsuits

(1) Daries Sherrills #172-312

Plaintiff

Governor Richard F. Celeste et al.

Atty. General Anothly Celebrezze; Frank Gray

O.S.R. Mr. Seither

Northern District of Ohio Eastern Division

Case No. Unknown

Judge Unknown

Still Pending

Filed around May 1983

Ending date—Unknown



I. Previous Lawsuits

(1) Daries Sherrills #172-312

Plaintiff

State of Ohio, Cleveland Police et al.

Defendant

Northern District Eastern Division

C83-584

Judge Mrs. Ann Aldrich

Still Pending

Filed around February

Ending date—Unknown

I. Previous Lawsuits

(1) Daries Sherrills #172-312

Plaitiff

Barbara Ryan, Head Nurse et al.

Defendants

Northern District Eastern Division

C83-148

Judge Mrs. Ann Aldrich

Still Pending

Filed around January

Ending date unknown

6. Approximate date of filing lawsuit: January 1, 1983
7. Approximate date of disposition: Unknown

**II. Place of present confinement: O.S.R. E—Dorm Annex**

- A. Is there a prisoner grievance procedure in this institution? (X) Yes ( ) No
- B. Did you present the facts relating to your complaint in the state prisoner grievance procedure? Yes ( ) No (X)
- C. If your answer is YES,
  1. What steps did you take?
  2. What was the result?
- D. If your answer is NO, explain why not: They can not resolve this matter.
- E. If there is no prison grievance procedure in this institution, did you complain to the prison authorities? Yes ( ) No ( )
- F. If your answer is YES,
  1. What steps did you take? N/A
  2. What was the result? N/A

**III. Parties**

*In Item A below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.*

- A. Name of Plaintiff: Daries Sherrills #172-312  
Address: P.O. Box 788 E—Dorm Annex

*In Item B below, place the full name of the Defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use item C for the names, positions, and places of employment of any additional defendants.*

- B. Defendant Nursing Director Mrs. Smith is employed as Director Nursing at Saint James Hospital at 511 Columbus, Ohio 43215
- C. Additional Defendants: Nurse Ruby Cummings, Doctor Greene, Frank Gray (Superintendent O.S.R.)

#### **IV. Statement of claim**

State here as briefly as possible the *facts* of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheet if necessary.

During 1976 to 1979 I was being sent to Columbus Correctional Facility for medical, examination , testing, and medical treatment during this period nurse Ruby Cummings gave me someone elses heart medication, when I was suppose to receive Darvasit, perscribed by Doctor Greene, my constitut ional rights as a United States citizen were violated under the 14, 8th Amendments and under color of state law, I have a history of blacking out and falling out, which began after an incident where I was hit in the back with a huhge or enormous size coffee pot while defending myself and striving to keep by break fast while in the county jail, I was transferred to Mansfield where I became very ill.

#### **V. Relief**

State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes.

This honorable Court to grant petitioner , one Daries Sherrills, his demands of relief an immediate release of confinement of Columbus Correctional Facility O.S.R. E—Dorm Annex and Ohio Penal System.

Due to the negligence Columbus Correctional Facility of the State of Ohio and St. James Hospital and staff members has caused cruel and unusual punishment inflicted upon him and I feel my civil rights of the United States Constitution has been violated.

And prays this Court understands that I am aware of the law and my civil rights as a citizen of the United States of America, and ask this honorable Court for a full investigation of this matter , and bring Columbus Correctional Facility to an immediate closure. C.C.F. continues to ignore the Courts order and developments.

Signed this 2 day of June, 1983.

/s/ "Pro Se" Daries Sherrills  
*Signature of Plaintiff*

*I declare under penalty of perjury that the foregoing is true and correct.*

6-2-83  
*Date*

/s/ "Pro Se" Daries Sherrills  
*Signature of Plaintiff*



EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY  
AT THE TIME OF FILMING. IF AND WHEN A  
BETTER COPY CAN BE OBTAINED, A NEW FICHE  
WILL BE ISSUED.

Case No 83-1534 <sup>(2)</sup>

In The  
Supreme Court Of The United States  
June Term, 1983

Frank Gray, et al.,  
Petitioners

v.  
Doris Sherrill,  
Respondent.

Brief in Opposition

Why a Petition For Writ Of Certiorari Should  
not be Granted

- (1) Plaintiff-Respondent was not allowed to amend his complaint or respond to reasons stated by district court in its notice of sua sponte dismissal. *Conley v Gibson*, *Wright v El Paso County Jail*
- (2) Plaintiff-Respondent's claim should not be dismissed for failure to state claim unless it appears beyond doubt that Plaintiff-Respondent can prove no set of facts. *Sherberg v Gristone*
- (3) Doctor Nyastani repeatedly acts of deliberate indifference when he disregarded Plaintiff-Respondent's original medical complaints of back injury, black outs, headaches, vomiting and cold sweats. *Jones v Wittenberg*, *Little v Walker*

(4) Doctor Nyastani's unjustified examination diagnosis and test for mercury in the blood, hepatitis, hernia, gall stones appendicitis ect and Plaintiff-Respondents being taken to the hospital on (13) different occasions on these erroneous diagnosis was indifferent and intentional. When Plaintiff-Respondent insistently voiced back, neck, knee and headache problems. Jones v Wittenberg Little v Walker

(5) Nurse Cummings not only negligently acted in this matter, but recklessly, deliberately and indifferently failed to carry out job duties and responsibilities of checking medication before handing it out, medical records and charts and Doctors prescriptions. Jones v Wittenberg Little v Walker

(6) Defendants-Petitioners acted under color of State law and should have known or known of acts or failure to act of subordinates and should be held responsible for subordinates acts or failures to act. - Howell v Department of Social Services of the City of New York, Jones v Wittenberg Little v Walker

(7) Plaintiff-Respondent medical records and Cayahoga County Sheriff records for disciplinary and medical (1975) will show claims made are true, also accident reports O.S.R. Mansfield Ashland College Branch, and job assignment accident reports, claims & records submitted to Southern District of Ohio Eastern Division and Fifth Circuit Court of Appeals. Jones v Wittenberg Little v Walker

(8) Plaintiff-Respondent should be allowed Jones v Wittenberg extension on time limit. Ohio Supreme Court Francis Adams v Kettering Memorial Hospital, Little v Walker

(9) Majority of Defendants are from Southern District. Jones v Wittenberg Little v Walker.

Respectfully Submitted  
Davis Sherill "Hick"



Pg ② no ④

# Law

Conley v. Gibson, 78 S. Ct. 99 (1957)  
Wright v. Ohio County Jail 642  
Fr. 2d 134 (1981)

Pg ② no ⑤ Sperberg v. Firestone and Rubber Co.  
(1973) DC Ohio 61 FRD 78

Pg ② no ③

Pg ② nos (4, 5, 6, 7, 8, 9) Jones v. Wittenberg, 57 Ohio  
of 2d 109, 323 Fr. Supp. 93 N.E.  
Ohio (1971) aff'd sub nom  
Little v. Walker, Co. Ill., 1977  
552 Fr. 2d 193 certiorari  
denied 98 S. Ct. 1507, 435  
U.S. 932, 55 L. Ed. 2d 530

Pg ③ no. ① Monell v. Department of Social  
Services of the City of New York  
, 436 U.S. 638, 56 L. Ed. 2d 611  
798 S.Ct. 2018 (1978)

Pg ② no ⑧ Ohio Supreme Court Mary Francis  
Adams v. Kettering Memorial  
Hospital in Dayton and Dr.  
William Sherk (1981)

CERTIFICATE OF SERVICE

I, Doris Sherrills, hereby certify that I have ,  
served a true and correct copy of the foregoing Brief on  
Opposition upon the defendant by  
placing same in a sealed, postage-prepaid envelope addressed to:

Office of the Clerk  
Supreme Court of the United States  
Washington D.C. 20543

and depositing same in the United States mail at Marion Correctional  
Institution the 6 day of June, 1984.

Doris Sherrills

NOTARY JURAT:

Sworn to and Subscribed before me this 6<sup>th</sup> day of \_\_\_\_\_

June, 1984.

Seal

Harvey E. Young  
Notary Public

HARVEY E. YOUNG, Notary Public  
State of Ohio  
My Commission Expires, July 6, 1986

My Commission Expires

STATE OF OHIO

COUNTY OF MARION

SS:

AFFIDAVIT OF VERITY

*indigency*

I, Darius Shirk, being first duly sworn according to law do hereby depose and say that I presently reside at the Marion Correctional Institution, P.O. Box-57, Marion, Ohio 43302; that I am the Respondent in the foregoing Brief in Opposition; and that I have read the Brief in Opposition and know the contents thereof and that the same are true and correct to the best of my knowledge except as to the matters herein stated to be alleged on information and belief and as to those matters having been stated as a belief. *I am unable to pay costs of proceedings.*

Darius Shirk

Appearing pro se  
Postal Box-57  
Marion, Ohio 43302

NOTARY JURAT:

Sworn to and Subscribed before me this 6<sup>th</sup> day of

June, 1984.

Seal

Harvey E. Young  
Notary Public

HARVEY E. YOUNG, Notary Public  
State of Ohio  
My Commission Expires, July 6, 1985

My Commission Expires